KETUA PENGARAH HASIL DALAM NEGERI
v. TCY JAYA SDN BHD

COURT OF APPEAL, PUTRAJAYA
AB KARIM AB JALIL JCA
CHE MOHD RUZIMA GHAZALI JCA
SEE MEE CHUN JCA
[CIVIL APPEAL NO: W-01 (A)-347-06-2021]
1 NOVEMBER 2023

Abstract – *While disputed payments could be regarded as outgoings and expenses wholly and exclusively incurred in the production of gross income and claimable for deduction of tax under s. 33(1) of the Income Tax Act 1967, the restriction entrenched in s. 39(1)(g) must be taken into essential account.*

REVENUE LAW: *Income tax – Additional assessment – Taxpayer's claim for deductions disallowed – Penalty imposed on taxpayer – Whether decision supported by facts and correct provisions of law – Whether there were inconsistencies in findings – Whether disputed payments were outgoings and expenses wholly and exclusively incurred in production of gross income – Whether claimable for deduction of tax under s. 33(1) of Income Tax Act 1967 – Whether restriction under s. 39(1)(g) applied*

The respondent was a taxpayer running a business involving logging and the buying and selling of timber logs. The appellant, having conducted a tax audit at the respondent's premises, had issued an additional notice of assessment which disallowed the latter's claim for deductions in the sums of RM1.148 million for the payment made to Keck Eng Timber ('KET') in year of assessment ('YA') 2004; the additional assessment and penalty charged against the respondent was RM186,636.11. For the same reason, the appellant issued another additional notice of assessment against the respondent for the amount of RM896,000 for YA 2005 and the additional assessment and penalty charged was RM295,818.85. Dissatisfied, the respondent appealed against the decision of the appellant to the Special Commissioners of Income Tax ('SCIT'). The SCIT, in allowing the appeal, held that the respondent had proven that it was entitled to tax deductions, under s. 33(1) of the Income Tax Act 1967 ('ITA'), for expenses incurred for the purchase of timber. The appellant's appeal to the High Court bore no success. Hence, the present appeal.

Held (allowing appeal with costs)
Per Che Mohd Ruzima Ghazali JCA delivering the judgment of the court:

(1) There were inconsistencies in the SCIT's findings. At sub-para. 8(vii) of the finding of facts, the SCIT found that the respondent had entered into an oral agreement to purchase timber from KET, a transaction that

involved payment of outgoings and expenses incurred in the production of gross income that enabled the respondent to make a deduction under s. 33(1) of the ITA. However, in the same finding of facts, in sub-para. 8(ix), the SCIT made a contradictory finding that the respondent did not have any timber concession to sell timber and it had purchased the timber concession from KET, a transaction involving payment that would constitute either payment for the use of licence or permit to extract timber which the deduction from the gross income was disallowed under s. 39(1)(g) of the ITA. The SCIT was uncertain of the status of the disputed payments made by the respondent to KET in YAs 2004 and 2005. Based on this uncertainty, the SCIT was incapable of making a correct decision in addressing the issue at hand and the High Court Judge ('HCJ') too failed to address His Lordship's mind to the said uncertainty. Both the SCIT and the HCJ erred in law by arriving at a conclusion that was not supported by the facts found and for applying the wrong provisions of law in determining the appeal. (paras 17, 18 & 36)

(2) The SCIT's finding of fact in sub-para. 8(ix) was correct as compared to the facts found in sub-para. 8(vii). The respondent had purchased timber concession from KET and not the timber or the standing logs. This was in line with the nature of the right given to the respondent in the agreement between the respondent and KET. The exclusivity of the right given to the respondent, to extract and remove all merchantable timber from the concession area, was akin to the right of a concessionaire. Therefore, even though the disputed payments could be considered as outgoings and expenses wholly and exclusively incurred in the production of gross income and claimable for deduction of tax under s. 33(1) of the ITA, regard must be made to the restriction stipulated under s. 39(1)(g) of the ITA. The disputed payments fell under the category of any sum paid for the use of a licence or permit to extract timber from the concession area. The respondent was prohibited from claiming deduction under s. 33(1), by virtue of s. 39(1)(g). (paras 21, 29, 32, 35 & 36)

(3) The appellant had correctly exercised his discretion pursuant to s. 113(2) of the ITA. There was no reason to disturb the appellant's discretion in imposing a penalty of 45% for incorrect returns instead of 100% allowable under the law. The judgment of the High Court and the decision of the SCIT were set aside. (paras 40 & 41)

Case(s) referred to:

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***

Chua Lip Kong v. Director General Of Inland Revenue [1981] 1 LNS 157 PC ***(refd)***

Director-General Of Inland Revenue v. Khoo Ewe Aik Realty Sdn Bhd [1990] 2 CLJ 160; 1990] 1 CLJ (Rep) 91 SC ***(refd)***

Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd [1991] 1 CLJ 656; [1991] 1 CLJ (Rep) 174 SC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Classic Japan (M) Sdn Bhd & Another Appeal [2021] 5 CLJ 86 HC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co [1992] 4 CLJ 2079; [1992] 1 CLJ (Rep) 135 SC ***(refd)***

Kok Hoong v. Leong Cheong Kweng Mines Ltd [1963] 1 LNS 61 PC ***(refd)***

Puran Singh v. Kehar Singh Bahadur Singh [1937] 1 LNS 51 HC ***(refd)***

Syarikat Ibraco-Peremba Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2015] 10 CLJ 114 CA ***(refd)***

Teruntum Theatre Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2006] 3 CLJ 123 CA ***(refd)***

Verschures Creameries, Limited v. Hull and Netherlands Steamship Company, Limited [1921] 2 KB 608 ***(refd)***

Yamamori (Hong Kong) Ltd v. Davidson [1992] 2 MLJ 410 ***(refd)***

Legislation referred to:

Income Tax Act 1967, ss. 33(1)(g), 99, 113(1), (2) para 34 Schedule 5

Other source(s) referred to:

Broom's Legal Maxims, 1st edn, p 103

Halsbury's Laws of England, 4th edn, para 1507

For the appellant - Ahmad Isyak Mohd Hassan & Syazana Safiah Rozman

For the respondent - Francis Tan Leh Kiah & Brandon Shen Shi Han; M/s Azman Davidson & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Appeal No: WA-14-36-07-2020 (overruled).]

Reported by Najib Tamby

JUDGMENT

Che Mohd Ruzima Ghazali JCA:

Introduction

[1] Aggrieved by the additional assessment made by the Director General of Inland Revenue (DGIR) in respect of year of assessment (YA) 2004 and 2005 in the amount of RM186,636.11 and RM295,818.85, respectively, TCY Jaya Sdn Bhd (TCY) appealed to the Special Commissioners of Income Tax (SCIT) pursuant to s. 99 of the Income Tax Act 1967 (ITA 1967). By a majority decision, SCIT allowed TCY's appeal. Dissatisfied with the decision, DGIR appealed to the High Court. At the High Court, the learned High Court Judge (LHCJ) found that the SCIT had considered the

testimonies of witnesses and all documents tendered in deciding the obligation of TCY to pay the additional assessments and there was no error in its determination on the questions of law based on the evidence before it and in its application to the facts to warrant intervention by the court. The LHCJ dismissed the DGIR appeal with cost. Aggrieved by the said decision, the DGIR appealed to this court.

Brief Facts

[2] TCY is a taxpayer. The principal business activity of TCY is connected with logging and the buying and selling of timber logs. It has business premises in Segamat, Johor. From 5 November 2007 to 7 November 2007, the DGIR conducted a tax audit at TCY's business premises.

[3] As a consequence of the tax audit, the DGIR issued an additional notice of assessment dated 16 July 2009 which disallowed TCY's claim for the deduction in the sums of RM1,148,000 for the payment made to Keck Eng Timber (KET) in YA 2004, and the additional assessment and penalty charged against TCY was RM186,636.11.

[4] For the same reason, the DGIR issued another additional notice of assessment dated 25 March 2010 against TCY for the amount of RM896,000 for YA 2005, and the additional assessment and penalty charged was RM295,818.85.

[5] Dissatisfied with the additional assessments, TCY filed notices of appeal in Form Q to SCIT dated 16 July 2009 and 25 March 2010, respectively. Both TCY's appeals were heard together on 1 April 2012, 23 August 2012, 19 September 2012 and 19 October 2012, and the decision of the SCIT was delivered on 22 August 2014.

[6] The findings of facts by the SCIT as mentioned in para. 8 of the case stated dated 29 June 2020 are as follows:

(i) Responden telah menjalankan audit di tempat perniagaan Perayu di Segamat pada 5.11.2007 sehingga 7.11.2007.

(ii) Semasa audit dijalankan Responden dimaklumkan oleh Perayu bahawa tiada perjanjian bertulis di antara Perayu untuk membeli balak dengan Keck Eng Timber.

(iii) Perayu mendakwa bahawa perbelanjaan berjumlah RM1,148,000.00 pada tahun TT 2004 dan RM896,000.00 pada tahun TT 2005 adalah kos pembelian balak daripada Keck Eng Timber.

(iv) Perayu mendakwa bahawa wujudnya perjanjian lisan untuk membeli balak daripada Keck Eng Timber atas dasar persahabatan dalam perniagaan.

(v) Perayu telah menjadikan perjanjian lisan untuk membeli balak dengan Keck Eng Timber kepada perjanjian bertulis yang telah dimatikan setem hasil.

(vi) Keck Eng Timber memperolehi hak untuk memotong balak daripada konsesi balak kepunyaan KDYMM Sultan Pahang.

(vii) Perayu memasuki perjanjian lisan untuk membeli balak daripada Keck Eng Timber.

(viii) Perayu telah mengupah kontraktor Kemajuan Sinar Trading Sdn. Bhd. untuk memasuki kawasan konsesi balak untuk memotong balak.

(ix) Perayu tidak mempunyai konsesi balak dan untuk menjual balak Perayu telah membeli konsesi balak daripada Keck Eng Timber.

(x) Saksi Responden bersetuju wujudnya kos untuk membeli balak dan mengatakan anggaran yang diberikan ialah RM7,000.00 seekar adalah terlalu tinggi.

(xi) Peguam Responden telah menggugurkan isu sama ada bayaran adalah berbentuk modal dan tidak dibenarkan di bawah seksyen 39(1) Akta.

The SCIT Decision

[7] By majority, the SCIT held that TCY has proved that it is entitled to tax deductions under s. 33(1) of the ITA 1967 for expenses incurred for the purchase of timber and allowed TCY's appeal. The deciding order dated 22 August 2014, *inter alia*, was as follows:

> ADALAH DIPUTUSKAN SECARA MAJORITI bahawa peruntukan belian untuk mendapatkan konsesi balak sebanyak RM1,148,000.00 bagi Tahun Taksiran 2004 dan berjumlah RM896,000.00 bagi Tahun Taksiran 2005 boleh dibenarkan sebagai perbelanjaan di bawah subseksyen 33(1) Akta Cukai Pendapatan 1967;
>
> ADALAH DIPUTUSKAN SECARA MAJORITI bahawa penalti yang dikenakan di bawah seksyen 113(2) Akta Cukai Pendapatan 1967 bagi Tahun-Tahun Taksiran 2004 dan 2005 berkaitan dengan rayuan ini diketepikan;
>
> MAKA DENGAN INI ADALAH DIPERINTAHKAN SECARA MAJORITI bahawa rayuan ini dibenarkan;

[8] However, by way of a minority decision, the learned panel chair held that TCY's substantive appeal should not be allowed because TCY had only made payments to KET in 2010 and 2011 and is entitled to deduct the disputed expenses in the YA 2010 and 2011, not as part of its expenditure for the YA 2004 and 2005. In relation to the issue of imposition of penalty under sub-s. 113(2) of the ITA 1967, the learned panel chair agreed with the majority that no penalty should be imposed.

[9] Aggrieved by the decision of the SCIT, the DGIR filed a notice of appeal to the High Court.

The High Court Decision

[10] The SCIT had considered the testimonies of the witnesses and the relevant documents in determining the obligation of TCY to pay tax for the payments made to KET in YA 2004 and 2005. There was no error in the SCIT's majority decision on the questions of law based on the evidence before it and in its application to the facts to warrant intervention by the court.

[11] As for the minority decision of the learned panel chair, there is an error of law in the decision. The word incurred does not only mean paid, an expenditure can be incurred without actually being disbursed. Therefore, it is irrelevant that TCY had only paid off the amount due under the merchantable timber purchase agreement in 2010 and 2011 since the crucial date is the date of the expenditure incurred, that is in 2004 and 2005.

[12] As regard to the penalty under sub-s. 113(2) of the ITA 1967, the SCIT is correct in determining that TCY should not be subject to any penalty in circumstances where the DGIR had mechanically imputed the penalty without proper consideration of relevant circumstances of the case and had been changing its basis in raising assessments thereby causing hardship to TCY. In addition, sub-s. 113(1) and (2) of the ITA 1967 does not cover situations where there is a difference of opinion on the interpretation of a particular provision of the act even where the court ultimately finds in favour of the appellant.

The Appeal

[13] Being dissatisfied with the decision of the High Court, DGIR appealed to this court. Fourteen grounds of appeal were listed in the memorandum of appeal. However, learned Senior Revenue Counsel (SRC) in his submission condensed all issues into one, that is, whether based on the facts found and stated by the SCIT, the decision of the High Court is correct in law. Meanwhile, the learned counsel for TCY submitted that the main issue for determination in this appeal is whether the High Court and the SCIT were wrong in law to determine that the disputed expenses claimed by TCY as its cost of producing its gross income should be allowed under sub-s. 33(1) of the ITA 1967.

Our Decision

[14] The law on appeal from the SCIT to the High Court is trite. Paragraph 34 of Schedule 5 to the ITA 1967 stipulates that:

34. Either party to proceedings before the Special Commissioners may appeal on a question of law against a deciding order made in those proceedings (including a deciding order made pursuant to paragraph 26(b) or (c) by requiring the Special Commissioners to state a case for the opinion of the High Court and by paying to the Clerk at the time of making the requisition such fee as may be prescribed from time to time by the Minister in respect of each deciding order against which he seeks to appeal.

[15] In *Chua Lip Kong v. Director General Of Inland Revenue* [1981] 1 LNS 157; [1982] 1 MLJ 235 the Privy Council dealt with the question of whether the appellate court can interfere with the primary facts found by the SCIT. At p. 236, Lord Diplock held as follows:

Their Lordships cannot stress too strongly how important it is that, in every Case Stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded. Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself; occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the Case Stated, but in that event, it will be necessary for the Case to be remitted to the Commissioners themselves for further findings. It is the primary facts so found by the Commissioners that they should set out in the Case Stated as having been "admitted or proved".

In *Director-General Of Inland Revenue v. Khoo Ewe Aik Realty Sdn Bhd* [1990] 2 CLJ 160; [1990] 1 CLJ (Rep) 91; [1990] 2 MLJ 415, Gunn Chit Tuan SCJ delivering the decision of the Supreme Court held that:

It is hardly necessary for any lawyer to be reminded that under our Income Tax Act 1967 (paras 34, 39, 41 and 42 of Schedule 5 of the Income Tax Act 1967) one may only appeal to the High Court and thence to the Supreme Court on a question of law. The decision of the Special Commissioners of Income Tax as to the facts is therefore conclusive. In this connection, it is interesting to note the following statement by Lord Denning on the powers of the High Court on appeal in *Griffiths v. JP Harrison, (Watford) Ltd* [1962] 1 All ER 909 at p. 916:

> Now the powers of the High Court on an appeal are very limited. The judge cannot reverse the commissioners on their findings of fact. He can only reverse their decision if it is 'erroneous in point of law'. Now here the primary facts were all found by the commissioners. They were stated in the case. They cannot be disputed. What is disputed is their conclusion from them. It is now settled, as well as anything can be, that their conclusion cannot be challenged unless it was unreasonable, so unreasonable that it can be dismissed as one which could not reasonably be entertained by

A them. It is not sufficient that the judge would himself have come to a different conclusion. Reasonable people on the same facts may reasonably come to different conclusions: and often do. Juries do. So do judges. And are they not all reasonable men? But there comes a point when a judge can say that no reasonable man could reasonably come to that conclusion. Then, but not till then, he is
B entitled to interfere.

A court would not therefore disturb findings of fact by the Special Commissioners unless it considers that the only reasonable conclusion on the evidence contradicts the determination of the Special Commissioners (see *Edwards v. Bairstow* 36 TC 207, *Director-General of Inland Revenue v. LCW*
C [1975] 1 MLJ 250 at p 251 and *Kota Kinabalu Industries Sdn Bhd v. Director-General of Inland Revenue* [1981] 2 MLJ 186 at p 190).

[16] Back to the appeal before us, the primary finding of facts made by the SCIT can be seen in para. 8 of the case stated, see pp. 73 and 74 Common Core Bundle (CCB) in encl. 14, and is reproduced in para. [6] above. To
D determine whether the TCY's disputed payments to KET in YA 2004 and 2005 were payments of all outgoings and expenses wholly and exclusively incurred in the production of gross income to enable TCY to make a deduction as provided under sub-s. 33(1) of the ITA 1967, the facts finding by the SCIT is pertinent. For ease of reference, the provision under
E sub-s. 33(1) of the ITA 1967 is as follows:

Adjusted income generally

33. (1) Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that
F source for that period all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source, including -

...

[17] Upon perusing the facts found by the SCIT, we are of the view that
G there are inconsistencies in the said finding. At sub-para. 8 (vii) of the finding of facts, the SCIT found that TCY entered into an oral agreement to purchase timber from KET, a transaction that involved payment of outgoings and expenses incurred in the production of gross income that enabled TCY to make a deduction under sub-s. 33(1) of the ITA 1967. However, in the same
H finding of facts in sub-para. 8 (ix), the SCIT made a contradictory finding that TCY does not have any timber concession to sell timber and it had purchased the timber concession from KET, a transaction involving payment that would constitute either payment for the use of licence or permit to extract timber which the deduction from the gross income is disallowed under
I para. 39(1)(g) of the ITA 1967. Again, for ease of reference, the provision under para. 39(1)(g) of the ITA 1967 is as follows:

Deductions not allowed

39(1) Subject to any express provision of this Act, in ascertaining the adjusted income of any person from any source for the basis period for a year of assessment no deduction from the gross income from that source for that period shall be allowed in respect of:

...

(g) any sum, by whatever name called, payable (otherwise than to a State Government or with the approval of the Minister, a statutory authority, or other body the capital or fund of which is wholly or substantially owned by a State Government or a statutory authority) for the use of a licence or permit to extract timber from a forest in Malaysia;

[18] Obviously, from the finding of facts as listed in the case stated, we observed that the SCIT itself is not certain of the status of the disputed payments made by TCY to KET in YA 2004 and 2005. Based on the uncertainty in the finding of facts, we are of the view that the SCIT is incapable of making a correct decision in addressing the issue at hand. From the grounds of judgment (GOJ), the LHCJ failed to address his mind on the said uncertainty.

[19] Besides that, we also observed and considered the submission raised by the learned SRC that there is another glaring error of law committed by the SCIT as reflected in the deciding order where the SCIT stated as follows:

Adalah Diputuskan Secara Majoriti bahawa peruntukan belian untuk mendapatkan konsesi balak sebanyak RM1,148,000.00 bagi Tahun Taksiran 2004 dan berjumlah RM896,000.00 bagi Tahun Taksiran 2005 boleh dibenarkan sebagai perbelanjaan di bawah subseksyen 33(1) Akta Cukai Pendapatan 1967.

Learned SRC submitted that since the SCIT found that the disputed payments were for the purchase of timber concession as opposed to the purchase of timber or standing logs, the decision that such payments are allowable under sub-s. 33(1) of the ITA 1967 is manifestly wrong in law. This is because the effect of the finding that the payments were for the purchase of timber concession is, the payments would then constitute either payments for the use of a licence or permit to extract timber in which the deduction is disallowed under para. 39(1)(g) of the ITA 1967.

[20] From the above observations, we find that there are two main questions of law that need to be addressed and decided by the High Court. Firstly, on the issue of the status of the disputed payments made by TCY to KET in YA 2204 dan 2005, and secondly, if the disputed payments are allowable under sub-s. 33(1) of the ITA 1967, whether the said disputed payments are subject to the restriction under para. 39(1)(g) of the ITA 1967.

A **First Issue – Status Of The Disputed Payments**

[21] It is an undisputed fact that TCY entered into an agreement with KET to extract and remove the timber from the concession owned by KDYMM Sultan of Pahang. In the beginning, there was only an oral agreement between TCY and KET. Then, TCY turned the oral agreement to a written agreement
B dated 3 March 2004 and was stamped on 12 March 2004 (the said agreement). See CCB at pp. 140 to 142 in encl. 14.

[22] TCY claimed that the said agreement was entered into to buy timber or standing logs from KET, not the timber concession. Therefore, the
C disputed payments were the cost of producing gross income and they were deductible under sub-s. 33(1) of the ITA 1967. In contrast, the DGIR took a different stand. It was argued that the tax audit shows that TCY acquired a timber concession from KET.

[23] As mentioned before, the LHCJ did not address this issue in his GOJ.
D To determine the dispute, we need to sieve through the appeal records. Unfortunately, no notes of evidence before the SCIT were produced in the appeal records even though the case stated clearly mentioned that two witnesses, each one witness from TCY and the DGIR had given oral testimony before the SCIT. Be that as it may, there are other documents and
E numerous correspondences between TCY and the DGIR in the appeal records that can be taken into consideration when it comes to a judicial fact-finding process. Those relevant documents and correspondences were listed in the CCB encl. 15, and can be considered as contemporaneous evidence in determining the status of the disputed payments.

F **[24]** To begin with, we refer to said agreement. In recital (A), it is stated that KET has secured the exclusive right to extract and remove all merchantable timber from the concession area in compartments 96-A and 97-A. In recital (B), KET agreed to sell and TCY agreed to purchase all merchantable timber found at the concession area subject to the terms and
G conditions, among others, as follows:

> 1. In consideration of the sum of Ringgit Malaysia: Two Million Forty-four Thousand Only (RM2,044,000.00), (hereinafter referred to as "the Purchase Price"). The 1st Party hereby agrees to sell and the 2nd Party hereby agrees to Purchase all merchantable timber found at the Concession Area subject to the terms and conditions
H hereinafter appearing.
>
> 2. All expenses payable to Jabatan Perhutanan Negeri Pahang stated in the Letter of Award dated 29th April 2003 and 13th June 2003, necessary for issuance of logging license for all the compartments and the Concession Area shall be the responsibility of the 2nd Party.
>
> I 3. Any increase in the payment of the above expenses as stated in clause 2, especially payment of premium shall be borne by the 2nd Party.

4. The 2nd Party shall have the exclusive right to manage all matters relating to logging activities at the Concession Area especially concerning extraction and selling of timber logs.

5. All timber logs extracted from the said Concession Area shall be sold by the 2nd Party and all proceeds of sale shall belong to 2nd Party absolutely.

6. The 2nd Party shall perform the logging activities strictly in accordance withal the rules and regulations set by Jabatan Perhutanan.

From the terms and conditions of the said agreement, we conclude that it reveals the following facts:

i. TCY secured the exclusive right from KET to manage all matters relating to logging activities at the concession area;

ii. TCY own all the extracted timber and has the right of disposal and all proceeds thereto absolutely belong to TCY; and

iii. TCY is to bear all the expenses payable to Jabatan Perhutanan Negeri Pahang as stated in the Letter of Award dated 29.4.2003 and 13.6.2003.

[25] The other contemporaneous evidence that needs to be taken into consideration is the correspondence between the parties. We observed that the earlier correspondences from TCY's tax agent to the DGIR alluded that the disputed payments are for the purchase of timber concession, and not for timber or standing logs. *Via* a letter dated 9 April 2008, see CCB at pp. 295 to 297 in encl. 15, TCY's tax agent in its appeal to the DGIR *inter alia*, submitted as follows:

Tahun taksiran 2004

(a) Perjanjian jual beli konsesi

Untuk makluman tuan, pelanggan kami telah memasuki *satu urusniaga berkaitan pembelian kawasan balak dengan pihak penjual, Keck Eng Timber. Kawasan balak berkenaan adalah berkaitan dengan kawasan kurniaan KDYMM Sultan Pahang di daerah Lipis, Pahang Darul Makmur. Kawasan Konsesi balak berkenaan meliputi kompartmen 96-A dan 97-A,* Hutan Simpan Ulu Jelai, daerah Lipis, Pahang Darul Makmur.

Bersama-sama ini kami kemukakan dokumen-dokumen berikut berkaitan dengan urusniaga berkenaan seperti berikut untuk tindakan pihak tuan selanjutnya:

(a) *Perjanjian pembelian kawasan konsesi balak* di antara Keck Eng Timber (penjual) dan Tan Chang Yong Holding Sdn Bhd (pembeli);

(b) Surat kelulusan daripada Jabatan Perhutanan Negeri Pahang berhubung kelulusan kawasan pembalakan di atas kompartmen 96-A, Hutan Simpan Ulu Jelai, daerah Lipis, Pahang Darul Makmur bertarikh 29 April 2003; dan

A (c) Surat kelulusan daripada Jabatan Perhutanan Negeri Pahang berhubung kelulusan kawasan pembalakan di atas kompartmen 97-A, Hutan Simpan Ulu Jelai, daerah Lipis, Pahang Darul Makmur bertarikh 13 Jun 2003. (emphasis added)

Subsequent correspondences from TCY's tax agent to DGIR dated 7 July B 2008 (see CCB at pp. 175 to 177 in encl. 15), 11 December 2008 (see CCB at pp. 203 to 205 in encl. 15), 22 December 2008 (see CCB at pp. 206 to 209 in encl. 15) and 6 January 2009 (see CCB at pp. 211 to 217 in encl. 15) also clearly show that TCY had admitted to the fact that the said agreement is for the purchase of the timber concession and not for buying timber or C standing logs from KET.

[26] Then, by a letter dated 26 February 2009 (see CCB at pp. 219 in encl. 15), the DGIR responded to TCY's tax agent letter dated 6 January 2009. In the said letter, the DGIR expresses his view on TCY's expenses in relation to the disputed payments as follows:

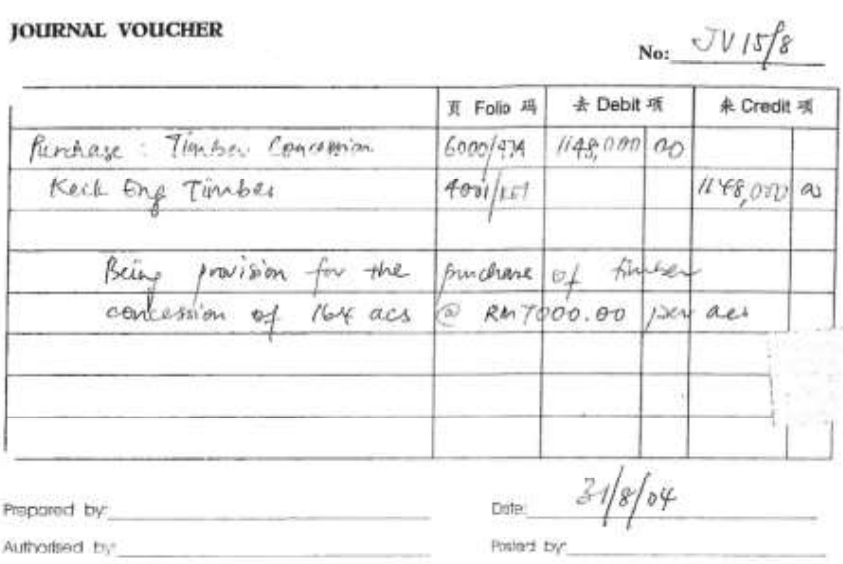
D 2. Adalah dimaklumkan, berdasarkan kepada fakta-fakta kes yang diterima perbelanjaan yang dilakukan adalah perbelanjaan untuk mendapatkan hak penebangan balak dan bukan pembelian kayu balak dari Keck Eng Timber.

3. Oleh itu Lembaga Hasil Dalam Negeri Malaysia berpendapat perbelanjaan yang dibayar kepada Keck Eng Timber tidak layak mendapat E potongan cukai di bawah seksyen 39(1)(g) Akta Cukai Pendapatan 1967.

Consequent to that, TCY changed its stance. Thereafter, the correspondence sent by TCY's tax agent to the DGIR no longer refers to the purchase of timber concessions. Instead, the said agreement is said to be for the purchase of timber or standing logs, see TCY's tax agent letter dated 23 March 2009 F at pp. 221 to 225 CCB, 11 May 2009 at pp. 227 to 229 CCB, 8 June 2009 at pp. 230 to 236 CCB and 16 June 2009 at pp. 238 to 246 CCB, all in encl. 15.

[27] Apart from those contemporaneous evidence, there is another relevant fact that is not disputed by TCY. The fact is that TCY had paid all expenses G under the said agreement. First and foremost, TCY admitted that it paid the royalty and the premium for 164 acres of the concession area at RM7,000 per acre in the amount of RM1,148,000. Other than that, TCY also admitted that it had paid the concession license and road permit to the forestry department. All receipts of payments were acknowledged by TCY. See H TCY's tax agent letter dated 11 December 2008 at p. 204 CCB, 22 December 2008 at p. 208 CCB and 6 January 2009 at pp. 213 and 216 CCB, and 23 March 2009 at p. 222 CCB, all in encl. 15.

[28] Finally, we also look at the journal voucher dated 31 August 2004 I which can be seen at p. 291 CCB in encl. 15. As documented in the journal voucher, it is crystal clear that the payment made is for the purchase of timber concession, not for timber or standing logs. For ease of reference, the journal voucher is as follows:



JOURNAL VOUCHER

No: JV 15/8

	頁 Folio 码	去 Debit 项		来 Credit 项	
Purchase : Timber Concession	6000/474	1148,000	00		
Keck Eng Timber	4001/KET			1148,000	00
Being provision for the	purchase	of timber			
concession of 164 acs	@ RM7000.00	per acs			

Prepared by: _____ Date: 31/8/04

Authorised by: _____ Posted by: _____

[29] Looking at the contemporaneous evidence, we are of the considered view that the SCIT's finding of fact in sub-para. 8 (ix) of the case stated is correct as compared to the facts found in sub-para. 8 (vii), that is, TCY had purchased the timber concession from KET. Our view is in line with the nature of the right given to TCY in the said agreement. The exclusivity of the right given to TCY to extract and remove all merchantable timber from the concession area is akin to the right of a concessionaire. Coupled with the fact that the amount to be paid by TCY to KET is in a fixed sum regardless of the number of the standing logs available in the concession area, negates the proposition that the said agreement is for the purchase of timber or standing logs.

[30] Moreover, the condition that TCY must bear all expenses for the logging license issued by the State Forestry Department, and the fact that TCY did pay for all the expenses including the royalty and the premium for the concession area, the concession licence and road permit further strengthen our view that TCY had purchased the timber concession and not merely purchasing the standing logs from KET. Above all, the journal voucher issued in the transaction clearly stated that the payment was a provision for the purchase of the timber concession.

[31] Besides that, TCY through its tax agent had lucidly admitted that the said agreement is to purchase the timber concession. This can be seen in TCY's tax agent's earlier letters of appeal to the DGIR. Only after knowing that the payment to purchase a timber concession is not allowable for deduction under the tax law did TCY change its stand. On this matter, the legal maxim of law on estoppel – *Allegans contraria non est audiendus* or 'he

who alleges contradictory things is not to be heard' shall apply. In the case of *Yamamori (Hong Kong) Ltd v. Davidson* [1992] 2 MLJ 410 at 418, Ian HC Chin JC (as he then was) refers to *Broom's Legal Maxims* (1st edn) at p 103 where it is stated as follows:

> This elementary rule of logic, which is frequently applied in our courts of justice, will receive occasional illustration in the course of this work. We may for the present observe that it expresses, in other language, the trite saying of Lord Kenyon, that a man shall not be permitted to 'blow hot and cold' with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest.

Halsbury's Laws of England (4th edn) at para. 1507 stated that:

> **Approbation and reprobation.** On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel *in pais*. The principle that a person may not approbate and reprobate expresses two proposition: (1) that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile; and (2) that he will not be granted, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.

In *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766; [2011] 6 MLJ 297, the Federal Court cited with approval the English Court of Appeal's decision in *Verschures Creameries, Limited v. Hull and Netherlands Steamship Company, Limited* [1921] 2 KB 608 wherein Scrutton LJ held:

> A plaintiff is not permitted to "approbate and reprobate." The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election – namely, that no party can accept and reject the same instrument: *Ker v. Wauchope* (1); *Dougias-Menzies v. Umphelby* (2). The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

Therefore, TCY shall not be permitted to 'blow hot and cold' or 'approbate and reprobate' to suit its own private interest, that is, to escape from paying tax.

[32] Based on the said reasons, we reiterate that the SCIT's finding of fact in sub-para. 8(ix) is perfectly correct. TCY had purchased the timber concession from KET and not the timber or the standing logs. Thus, even though the disputed payments can be considered as outgoings and expenses

wholly and exclusively incurred in the production of gross income, and claimable for deduction of tax under sub-s. 33(1) of the ITA 1967, regard must be made to the restriction as stipulated under para. 39(1)(g) of the ITA 1967.

Second Issue – The Restriction Under Paragraph 39(1)(g) Of The ITA 1967

[33] The SCIT's finding of fact in sub-para. 8 (xi) of the case stated shows that learned SRC who represents the DGIR had dropped the issue of whether the disputed payments are capital in nature and therefore was not allowed under para. 39(1)(g) of the ITA 1967. In other words, learned SRC had abandoned the issue on the applicability of para. 39(1)(g) of the ITA 1967 in TCY's appeal before the SCIT. In his submission before us, learned counsel for TCY had specifically stressed that the DGIR could not revisit the issue that had been abandoned before the SCIT and was not argued before the High Court. Learned SRC admitted and acknowledged the said fact. However, learned SRC did submit before us that para. 39(1)(g) of the ITA 1967 shall apply to the disputed payments. Therefore, the question before us is whether the principle of estoppel apply against DGIR in such a situation.

[34] The law on estoppel *in pais*, that is estoppel by words or conduct against the statutory provision is well-settled. There are numerous high authorities decided on this matter. Among others, in *Puran Singh v. Kehar Singh Bahadur Singh* [1937] 1 LNS 51; [1939] 1 MLJ 71, Thomas CJ held as follows:

> The main question argued at the appeal was that the learned trial Judge having held that the registration of Kehar Singh as proprietor of certain lands had been obtained by means of an insufficient or void instrument, *viz.*, an invalid power of attorney, and that it was in consequence void under section 42(iii) of the Land Code, he was wrong in holding that the plaintiff was estopped by his conduct from objecting to the registration. In support of this contention, he cited *Borrow*'s case (1880) 14 ChD 432 in which it is stated by Bacon, VC, in the course of his judgment that:
>
> > … the doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract inter partes and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament.
>
> This view is followed in the case of *Abdul Aziz v. Kanthen Mallik* 38 ILR Cal 512 515 in which at page 515 a long list of authorities has been set out. The Court there decided that it was not prepared to accede to the argument that the principle of estoppel overrides the provisions of either section 78 of the Land Registration Act or section 60 of the Bengal Tenancy Act.

In *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1963] 1 LNS 61; [1964] 1 All ER 300; [1964] MLJ 49, the Privy Council had considered the plea of estoppel in the face of a statute and held as follows:

> The respondent has invoked in support of its defence a principle which appears in our law in many forms, that a party cannot set up an estoppel in the face of a statute. Thus, a corporation on which there is imposed a statutory duty to carry out certain acts in the interest of the public cannot preclude itself by estoppel *in pais* from performing its duty and asserting legal rights accordingly. See *Maritime Electric Co Ltd v General Dairies Ltd and Southend-on-Sea Corpn v. Hodgson (Wickford) Ltd*. Given a "statutory obligation of an unconditional character" it is not open to the court to allow the party bound by that obligation to be barred from carrying it out by the operation of an estoppel. Similarly, there is, in most cases, no estoppel against a defendant who wishes to set up the statutory invalidity of some contract or transaction on which he is being sued, despite the fact that by conduct or other means he would otherwise be bound by estoppel; see *Re a Bankruptcy Notice*, in particular per Atkin LJ ([1924] 2 Ch at p 96).

Supreme Court in *Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd* [1991] 1 CLJ 656; [1991] 1 CLJ (Rep) 174 at p. 179; [1991] 1 MLJ 404 at p. 407, held that:

> On the question of issue estoppel, we agree with the learned judge that on the facts of this case the appellants cannot invoke the doctrine of issue estoppel. There can be no estoppel as against statutory provisions. ...

In *Teruntum Theatre Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2006] 3 CLJ 123; [2006] 4 MLJ 685, commenting on the same issue, the Court of Appeal had this to say:

> [18] Estoppel is a rule of evidence which can only be invoked in special circumstances. The estoppel relied upon by the taxpayer against Revenue in this case is that of estoppel *in pais*, *ie*, estoppel by words or conduct. In our view, the Special Commissioners were not wrong to reject the suggestion that the assessment by the respondent of a taxpayer under the RPGT was an irrevocable act. Estoppel cannot be invoked against the Director General of Income Tax when he is put to notice that an incorrect assessment has been made under the RPGT. The Director General cannot raise an estoppel against himself from discharging his statutory duty to raise a correct assessment under the appropriate law if the basis of treating the gain as a capital gain was not within the meaning ascribed to it by the RPGT and no real property gains tax is payable. In such a situation, the Director General is not absolved from discharging his duty of raising the correct assessment in accordance with the relevant law. No person can raise an estoppel against himself so as to defeat a positive duty imposed upon him by a statute (*Maritime Electric Co Ltd v. General Diaries Ltd* [1937] AC 610 at pp. 620-621), The duty of both parties, the Director General and the taxpayer, is to obey the law.

Guided by the clear settled principle of law enunciated in those authorities, we find that the learned SRC who represented DGIR is not estopped from raising the issue of the restriction stipulated under para. 39(1)(g) of the ITA 1967 even though the matter was abandoned before the SCIT and also not argued before the High Court.

[35] Based on our reasoned finding that the SCIT had made a correct finding of fact in sub-para. 8(ix) of the case stated, the disputed payments fall under the category of any sum paid for the use of a licence or permit to extract timber from the concession area. Thus, TCY is prohibited from claiming deduction under sub-s. 33(1) of the ITA 1967 by virtue of para. 39(1)(g) of the ITA 1967.

[36] In such a situation, we find that the LHCJ had failed to exercise his appellate function to consider and decide on the question of law, that is, whether the SCIT had correctly addressed the law in determining whether TCY is entitled to deduct the disputed payments as its cost of producing gross income under sub-s. 33(1) of the ITA 1967 by virtue of the restriction under para. 39(1)(g) of the ITA 1967. We agree with learned SRC's contention that both the SCIT and the High Court had erred in law by arriving at a conclusion not supported by the facts found and thereby, applying the wrong provision of law in determining the appeal.

Penalty Under s. 113 Of The ITA 1967

[37] Finally, we will address the issue of the penalty imposed by the DGIR against TCY. The law on the penalty imposed on the incorrect returns sent by the taxpayer to the DGIR is trite. Section 113 of the ITA 1967 provides as follows:

> **Incorrect returns**
>
> 113(1) Any person who:
>
> (a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or
>
> (b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,
>
> shall, unless he satisfies the court that the incorrect return or incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than ten thousand ringgit and shall pay a special penalty of double the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct.

A (2) Where a person:

(a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

B (b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,

then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, the Director General may require that person to pay a penalty equal to the amount of tax which has C been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct; and, if that person pays that penalty (or, where the penalty is abated or remitted under subsection 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence D under subsection (1).

Under sub-s. 113(2), if a taxpayer is not prosecuted, the DGIR may require the taxpayer to pay a penalty equal to the amount of tax that was undercharged due to the incorrect returns. In other words, the DGIR has discretionary power to impose penalty up to 100% of the amount of tax due, E a discretion that cannot be exercised at whim and fancy. See Supreme Court decision in *Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co* [1992] 4 CLJ 2079; [1992] 1 CLJ (Rep) 135; [1992] 2 MLJ 708.

[38] From the facts, it is not disputed that the filing of incorrect returns by F TCY in YA 2004 and 2005 was discovered during the tax audit by the DGIR at TCY's business premises in Segamat, Johor which was held from 5 November 2007 to 7 November 2007. By the nature of the business transaction with KET, that is, TCY had bought the timber concession and was under obligation to pay all expenses including the licence fee to extract the timber, TCY should have known that the disputed payments were G prohibited from claiming deduction as provided under para. 39(1)(g) of the ITA 1967. It is a general legal principle that ignorance of the law is no defence – *ignorantia juris non excusat*. TCY cannot claim ignorance of the clear provision of law.

H **[39]** Furthermore, good faith is not a defence against the imposition of penalty under sub-s. 113(2) of the ITA 1967. The Court of Appeal decision in *Syarikat Ibraco-Peremba Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2015] 10 CLJ 114 at p. 131; [2017] 2 MLJ 120 at p. 139 held that:

I [40] It is without doubt that s. 113(2) of the Act gives a discretion to the respondent to impose a penalty on a person who has failed to observe the requirements of the law as provided in para. 2(a) or (b) of s. 113. Hence the use of the phrase 'the Director General may require that person to

pay a penalty'. There is a clear distinction between sub-s. 113(1) and sub-s. 113(2). Although paras. 113(1)(a) and (b) and paras. 113(2)(a) and (b) are almost identical, but the effect of sub-s. 113(1) is different from sub-s. 113(2). Sub-section 113(1) provides for an offence being committed in the circumstance provided for in para. (a) or (b) unless that person 'satisfies the court that the incorrect return or incorrect information was made or given in food faith'. Whereas sub-s. 113(2) provides for a situation where there is no prosecution under sub-s. 113(1) has been instituted in the circumstances provided for in para. 113(2)(a) or (b), the Director General may require that person to pay a penalty. That being the case, the defence of 'good faith' as found in sub-s. 113(1), and not found in sub-s. 113(2), does not apply to the Director General's discretion under sub-s 113(2). We therefore disagree with the appellant's submission on this score.

See also the Court of Appeal decision in *Ketua Pengarah Hasil Dalam Negeri v. Classic Japan (M) Sdn Bhd & Another Appeal* [2021] 5 CLJ 86; [2022] 3 MLJ 894 at pp. 916 to 917.

[40] Having considered the facts and the applicable law on this issue, we find that the DGIR had correctly exercised his discretion pursuant to sub-s. 113(2) of the ITA 1967. We do not find any reason to disturb the DGIR's discretion in imposing a penalty of 45% for incorrect returns, instead of 100% allowable under the law.

Conclusion

[41] For the above reasons, we are unanimous in our decision that there are merits in the DGIR's appeal which warrant appellate intervention. We therefore allow the DGIR's appeal and set aside both the judgment of the High Court and the decision of the SCIT with cost of RM20,000 here and below to be awarded to DGIR subject to the allocatur.